Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MASTER SERGEANT DORIS L. NAPOLEON,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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September 1997

56 pp

QUESTIONS PRESENTED

1. Whether the military judge committed prejudicial error when he denied the defense Motion to Suppress appellant's oral and written statements made to an investigative agent.

2. Whether the military judge committed prejudicial error by denying the defense challenge for cause of a court-martial member who was familiar with a key prosecution witness and certain facts surrounding the charged offense.

3. Whether the petitioner was denied effective assistance of counsel when her trial defense counsel failed to try to suppress part of a prosecution witness' testimony that pertained to a privileged communication.

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II. PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE DENIED THE DEFENSE CHALLENGE FOR CAUSE OF COLONEL PETERSON.

III. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT, SINCE COUNSEL SHOULD HAVE TRIED TO SUPPRESS THE PART OF TSGT WALTERS' TESTIMONY THAT PERTAINED TO A PRIVILEGED COMMUNICATION.

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The petitioner, Master Sergeant Doris L. Napoleon respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on July 10, 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 46 M.J. 279 (1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 44 M.J. 537 (A.F.Ct.Crim.App. 1996), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on July 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. § 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On March 12, 1994, contrary to her pleas, petitioner was convicted of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 USC § 918. The adjudged and approved sentence provides for a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade.

On April 26, 1996, the Air Force Court of Criminal Appeals affirmed the findings and sentence. 44 M.J. 537 (A.F.Ct.Crim.App. 1996) (Appendix B).

On September 25, 1996, the Court of Appeals for the Armed Forces granted review on the following issues of law:

I

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS APPELLANT'S ORAL AND WRITTEN STATEMENTS MADE TO OSI SPECIAL AGENT KELLY.

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE CHALLENGE FOR CAUSE OF COLONEL PETERSON.

III

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, SINCE COUNSEL SHOULD HAVE TRIED TO SUPPRESS THE PART OF TSGT WALTERS' TESTIMONY THAT PERTAINED TO A PRIVILEGED COMMUNICATION.

On July 10, 1997, the Court of Appeals for the Armed Forces issued its decision, holding that the issue of whether the military judge erred by denying the petitioner's motion to

suppress her statements was moot since the statements were not entered into evidence; the military judge did not err in failing to grant the defense challenge for cause of Colonel Peterson, either on the grounds of actual or implied bias; and petitioner did not carry her burden of rebutting the presumption that her trial counsel were competent by showing that a motion to suppress the testimony of TSgt Walters would have been meritorious.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE DENIED THE DEFENSE MOTION TO SUPPRESS APPELLANT'S ORAL AND WRITTEN STATEMENTS MADE TO OSI SPECIAL AGENT KELLY.

At trial, defense counsel submitted a motion to suppress the oral statements made to SSgt Simonis, a military security policeman, at the NCO Club and the oral and written statements made to Special Agent Kelly. The written motion and the addendum are Appellate Exhibits II and III; the government's responses are Appellate Exhibits IV and V; the only documentary evidence, in addition to the attachments to the motions and responses, is the stipulation of fact, found at Appellate Exhibit VI; the only testimony relevant to this issue is that of Special Agents Kelly, Stewart, and Aguilar found at R. 51–77.[1]

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[1]The other testimonial evidence presented for the purposes of this pretrial motion pertained to the statement that appellant made to SSgt Simonis at the NCO Club. That statement is not the subject of this assigned error.

Amazingly, neither party offered the written statement as an exhibit or as an attachment to their pleadings. Since the government ultimately did not offer the statement into evidence, it is nowhere in the record of the actual trial. The statement was submitted under separate motion to the Air Force Court of Criminal Appeals.

The facts and circumstances surrounding this interview were not in dispute, as evidenced by the stipulation of fact. (App. Ex. VI.)

In the military judge's findings, he stated that at approximately 0833 on 31 July 1993, SA Kelly, assisted by SA Thompson, began to interview appellant at the OSI headquarters at Vandenberg AFB. At that time, appellant was in custody and was a suspect. At the outset of the interview, SA Kelly advised appellant that she was suspected of the stabbing of Harris even though SA Kelly knew that Harris was dead. He did not advise appellant that she was a suspect in the death of Harris. Subsequent to the otherwise proper advice, appellant waived her rights to remain silent and to the assistance of counsel, and made both oral and written statements. (R.80–81.)

The military judge, in his findings, did not address the testimony of Special Agents Stewart and Aguilar, and Attachments 6–8 of the defense motion, all of which was crucial evidence. SA Stewart testified that he was concerned about this rights advisement, since SA Kelly had intentionally left out any reference to murder or the fact that Harris had died. He contacted Major Claypool, a judge advocate on base, and they decided to give appellant a cleansing warning, and to readvise her that she was suspected of murder. SA Stewart, along with SA Aguilar, did in fact approach appellant later that morning, and readvised her of her rights, stating that the earlier statement that she made may not be used against her in court. They used a statement prepared by Major Claypool.

(Defense motion, Atch 8; R. 70–75.) SA Aguilar, who accompanied SA Stewart, took the prior written statement and sealed it in an envelope and initialed it. He did this in the presence of appellant before they initiated the second interview. (R. 76–77.)

In this second interview, after being advised that Harris had died, appellant elected not to make a statement.

The military judge, in his conclusions of law, stated that the advice that appellant was suspected of the stabbing of Harris was sufficient to orient her as to the nature, transaction, or incident of which she was suspected, and complied with both Article 31 and pertinent case law, particularly *United States v. Rice,* 11 U.S.C.M.A. 524, 29 C.M.R. 340 (1960), and *United States v. Quintana,* 5 M.J. 484 (C.M.A. 1978).

A close analysis of these two cases shows that they are quite different from the case *sub judice.* In *Rice*, an OSI agent advised the accused of his Article 31 rights, stating that he was being investigated of a criminal offense, and that he "most certainly" would not have made a statement, if he had been so advised. The Court held that the "purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with *technical nicety.*" *Rice*, 342 (emphasis added).

Appellant asserts that the difference between a stabbing and a murder is more than a mere "detail" or "technical nicety." It is also worth noting that *Rice* was decided before Miranda[2] and its progeny.

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966)

In *Quintana*, the accused was advised of his Article 31 rights, and that he was suspected of larceny of the ship's store funds. The investigators did not advise him that he was also suspected of the wrongful appropriation of money from the same fund during an earlier period. The Court held that this was an adequate warning, since it did orient the accused to the nature of the offense. The Court also noted that the investigator was not aware of the degree of the accused's involvement until he made the statement in question, thus there was no bad faith. *Quintana*, 486–487.

Unlike *Rice* and *Quintana*, the case *sub judice* involves bad faith on the part of the investigator. SA Kelly testified that he did not want to use the term "murder" or "premeditated murder", even though appellant was in fact suspected of the murder of Harris. He contacted Major Blair, the Chief of Military Justice, who advised him that it was fine to advise appellant that she was suspected in the stabbing of Harris, even though SA Kelly and Major Blair knew that Harris had already been pronounced dead. (R. 58–59.) SA Kelly made a "conscious decision" not to advise appellant of the crime of which she was suspected. (R. 65.) He and SA Thompson even had "death" written on the AFOSI Form 73 (Interview Record), but it was crossed out and replaced with the word "stabbing." (R. 66–67; App. Ex. IV (Atch.))

A criminal suspect must be oriented as to the suspected crime, so as to allow time to intelligently weigh the consequences of responding to investigator's inquiries. Military members are entitled to be notified of the nature of the offense before there can be a valid waiver. *United States v. Reynolds*, 37 C.M.R. 23 (1966); *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). It is clear that appellant did not understand the nature and importance of the crime of murder when she made her incriminating oral and written statements. This is evident in the fact that when she was advised that she

was suspected of murder, she chose to remain silent. Also, even SA Stewart and Major Claypool felt that this rights advisement was improper, and readvised appellant of her rights, complete with a "cleansing warning".

The statements were clearly obtained in violation of appellant's Article 31 rights, and the military judge erred by not suppressing them.

II. PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE DENIED THE DEFENSE CHALLENGE FOR CAUSE OF COLONEL PETERSON.

The defense challenged five members for cause. Three of these challenges were granted, with trial counsel's concurrence. On two of these challenges, Colonel Peterson and MSgt Kelsey, the trial counsel objected, and the military judge subsequently denied them. The defense then peremptorily challenged Colonel Peterson, but properly preserved the issue for appeal.

During group voir dire, Colonel Peterson stated that he knew Special Agent (SA) Stewart, but said that there was nothing about their acquaintance that would disqualify him. Colonel Peterson then stated that SA Stewart was "very credible" because of the job he has. The military judge then asked several questions in an attempt to rehabilitate him. (R. 124)

A challenge for cause should be granted if the member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N).

A trial judge should be liberal in granting challenges for cause, but reversal of a trial judge's rulings is appropriate only if there was "abuse of discretion." *United States v. White,* 36

M.J. 284 (C.M.A. 1993). The test for evaluating the propriety of the trial judge's ruling denying a challenge for cause is "whether he [the prospective member] is mentally free to render an impartial finding and sentence based on the law and the evidence." *United States v. McQueen*, 7 M.J. 281 (C.M.A. 1979).

Impaneling this court member over defense objection would cause reasonable people to call into serious question the fairness of appellant's court martial. *United States v. Harris*, 13 M.J. 288, 291 (C.M.A. 1982). Because the appearance of evil with regard to court-martial proceedings must be avoided as much as the evil itself, the challenge for cause against Colonel Peterson should have been granted "in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N); *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985). Indeed, as the Air Force Court of Military Review has held, "It is important that justice be dispensed in such a manner as to foster the image of fairness and integrity." *United States v. Barnes*, 12 M.J. 956 (A.F.C.M.R. 1982).

The appellant was entitled to a trial before a panel free from any influence outside the courtroom. *United States v. Deain*, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954); *Barnes* 12 M.J. at 958. The military judge denied this right to the appellant by denying the defense's challenge for cause. Colonel Peterson was clearly influenced by the news media, staff meetings, and his positive impression of SA Stewart.

In the case *sub judice*, Colonel Peterson clearly possessed enough outside information to require that he be challenged for cause. His statements that he could be impartial were inadequate to overcome his prior knowledge of the case.

III. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT, SINCE COUNSEL SHOULD HAVE TRIED TO SUPPRESS THE PART OF TSGT WALTERS' TESTIMONY THAT PERTAINED TO A PRIVILEGED COMMUNICATION.

Information relevant to this issue is found in two affidavits submitted by motion to the Air Force Court of Criminal Appeals. The first affidavit, dated 6 April 1995, is written by appellant (hereinafter referred to as "appellant's affidavit"). The second affidavit, dated 5 April 1995, is written by TSgt Walters (hereinafter referred to as "Walters' affidavit").

TSgt Walters testified for the government. He said that he visited appellant at the confinement facility on 7 August 1993, shortly after the stabbing incident. He testified as follows:

> Q: And what did Sergeant Napoleon say to you. . . ?
>
> A: Basically, when I approached Sergeant Napoleon that day, I came to see her at about one o'clock or so and we, basically, met each other and we sat down and we talked. And the first thing that we got into, she said that she was fine and, you know, she was awake and out of shock. For the most part, she was letting us know that she was okay because that was my reason for being there. And at that point, you know, we said, you know, she realized what had happened and everything that had been done. And she definitely had told me at that time that she wasn't angry or enraged or anything when the incident occurred. It just kind of went on and on from there.

Q: Okay, did she say, "I know what I did was wrong"?

A: Yes, sir.

(R. 485–486.)

The defense did not object to this testimony.

TSgt Walters is a lay minister, and appellant felt confident that anything she said to him would be confidential. (Appellant's affidavit; Walters' affidavit.) Both trial defense counsel were aware of these circumstances. (Appellant's affidavit.)

Military Rule of Evidence 503 gives a person the privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as matter of conscience.

Appellant's communication with TSgt Walters is covered by M.R.E. 503. TSgt Walters felt compelled to come and visit appellant "as one of his fellow sisters in trouble and need." Appellant stated, "it was during this visit with TSgt Walters that I was compelled to lay my burdens before him . . . [b]ecause TSgt Walters was a layminister (sic), I felt very confident in expressing and releasing my innermost feelings, since I knew that all communications with ministers and chaplains were considered privileged communications." (Appellant's affidavit.)

TSgt Walters has stated that he is a lay minister, and that, "[a]s a servant of the Lord Jesus Christ I followed my teaching to visit those in captivity." (Walters' affidavit.) On one occasion, TSgt Walters and his wife prayed with appellant. (Appellant's affidavit; Walters' affidavit.) Although TSgt Walters says "[m]y visits were as an acquaintance

through our common organization and as a co-member of the Hospital Top Four," the focus is on appellant's perception of the purpose of the communication, not TSgt Walters' perception, since appellant's intent is controlling. M.R.E. 503; *United States v. Moreno*, 20 M.J. 623, 627 (A.C.M.R. 1985).

The Sixth Amendment of the United States Constitution guarantees an accused the right to "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The same right is afforded to servicemen in trials by court-martial under Article 27(b), UCMJ. *United States v. Dicupe*, 21 M.J. 440 (C.M.A. 1986); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). An accused has a right to a reasonably competent counsel who exercises that competence in his client's behalf throughout the trial. *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982).

This Honorable Court has set out a two-part standard to determine whether an individual has been denied the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 669 (1984). An appellant must identify acts or omissions by his or her attorney, and then bear the burden of persuading the court that, based on the facts as counsel knew them and eliminating the distortion of hindsight, those acts or omissions ". . . were outside the range of professional competent assistance." *Id.*, at 689. This Honorable Court cautioned that appellate courts must understand that "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* An appellant must also show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" was defined as a "probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

In the case *sub judice*, appellant has met both parts of the standard set out in *Strickland*, *supra*. Trial defense counsel

were aware that TSgt Walker's testimony involved a confidential, privileged communication. Despite this knowledge, there was no objection, and there is no indication that they even questioned whether the testimony was admissible.

The prejudice is apparent. TSgt Walters' testimony was the only direct evidence of premeditation. Without this testimony, there would have probably been a finding of unpremeditated murder or voluntary manslaughter. However, because of this testimony, the defense did very little to advocate such findings (although they did request the instruction on these two lesser included offenses).

Based on these reasons, appellant was denied effective assistance of counsel.

Conclusion

The military judge committed prejudicial error in denying the defense motion to suppress her oral and written statements made to OSI Special Agent Kelly and in denying the defense challenge for cause, thus violating her constitutional right to due process under the Fifth Amendment. Petitioner was denied effective assistance of counsel guaranteed by the sixth amendment since trial defense counsel failed to try to suppress TSgt Walters' testimony that pertained to a privileged communication.

Respectfully submitted,

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September 1997

APPENDIX A

UNITED STATES, Appellee,

v.

Doris L. NAPOLEON, Master Sergeant
U.S. Air Force, Appellant.

No. 96–0919

Crim.App. No. 31332

U.S. COURT OF APPEALS FOR
THE ARMED FORCES.

Argued Feb. 5, 1997

Decided July 10, 1997

Accused was convicted by general court-martial, William C. Thompson, Jr. J., of premeditated murder. The United States Air Force Court of Criminal Appeals affirmed, 44 M.J. 537. Review was granted. The United States Court of Appeals for the Armed Forces, Gierke, J., held that: (1) issue of whether military judge erred by denying accused's motion to suppress her statements to special agent was moot; (2) record supported denial of challenge for cause to panel member who knew prosecution witness; and (3) clergy privilege did not apply to accused's statements to lay minister.

Affirmed.

Sullivan and Crawford, JJ., issued opinions concurring in part and concurring in result.

1. Military Justice ⊶ 1419

Issue of whether military judge erred by denying accused's motion to suppress her statements was moot;

statements were not offered into evidence, and, although accused asserted that military judge's ruling affected tactical and strategic decisions throughout trial, she did not identify what decisions were affected or what she would have done differently.

2. Military Justice ⊶ 1419

Question whether issue is moot is question of law that is reviewed de novo.

3. Military Justice ⊶ 1419

Issue is "moot" if resolving it would not result in material alteration of situation for accused or for government.

See publication Words and Phrases for other judicial constructions and definitions.

4. Military Justice ⊶ 884.1

Both actual bias and implied bias are included in rule which provides that court member "shall be excused" when that member should not sit in interest of having court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(N).

5. Military Justice ⊶ 884.1

On issues of whether panel member should be removed for cause based on actual bias, prior professional relationships and innocuous prior knowledge of the facts of case are not per se disqualifying. R.C.M. 912(f)(1)(N), (f)(3).

6. Military Justice ⊶ 884.1

Test for "actual bias" on part of panel member, for purposes of challenge for cause, is whether any bias is such

that it will not yield to evidence presented and judge's instructions. R.C.M. 912(f)(1)(N).

See publication Words and Phrases for other judicial constructions and definitions.

7. Military Justice ⚷ 1420

Military judge's ruling on challenge for cause is reviewed for abuse of discretion. R.C.M. 912(f)(1)(N).

8. Military Justice ⚷ 891, 1420

While military judges must grant challenges for cause liberally, military judge's determination not to grant challenge will not be overturned except for clear abuse of discretion in applying liberal-grant mandate. R.C.M. 912(f)(1)(N).

9. Military Justice ⚷ 884.1

Question of actual bias on part of panel member is essentially one of credibility and therefore largely one of demeanor. R.C.M. 912(f)(1)(N).

10. Military Justice ⚷ 1419

Military judge enjoys great deference in ruling on challenge for cause because he has observed demeanor of participants in voir dire and challenge process. R.C.M. 912(f)(1)(N).

11. Military Justice ⚷ 1419

Issues of implied bias on part of panel member are reviewed under somewhat less deferential standard than are issues of actual bias; while actual bias is reviewed through eyes of military judge or court members, implied bias is

reviewed under objective standard, viewed through eyes of public. R.C.M. 912(f)(1)(N).

12. Military Justice ⊶ 884.1

In determining whether panel member should be removed for cause on ground of implied bias, focus is on perception or appearance of fairness of military justice system. R.C.M. 912(f)(1)(N).

13. Military Justice ⊶ 884.1

Denial of challenge for cause to panel member on ground of actual bias was not abuse of discretion, even though challenged member stated that he had heard about case, that he knew prosecution witness, whom he considered to be "very credible," and that he would "automatically" believe that witness when weighing his testimony against other witnesses; panel member's responses during voir dire unequivocally demonstrated his willingness to judge case based on evidence presented in open court in accordance with military judge's instructions. R.C.M. 912(f)(1)(N).

14. Military Justice ⊶ 884.1

Denial of challenge for cause to panel member on ground of implied bias was not abuse of discretion, even though member stated that he had heard about case, that he knew prosecution witness, whom he considered to be "very credible," and that he would "automatically" believe that witness when weighing his testimony against other witnesses; member's prior knowledge of case was limited and general, his association with witness was not social, but purely professional, witness's credibility at trial was not contested, and his testimony before members was limited to his description of search of crime scene and search, with her consent, of accused's home. R.C.M. 912(f)(1)(N).

15. Military Justice ⚷ 1126.1

Because lay minister at base chapel was not "clergyman" and was not acting as "clergyman's assistant" when he visited with accused while she was in pretrial confinement, and because accused did not reasonably believe that lay minister was acting as clergyman, their conversation was not protected by clergy privilege; term "lay minister" was ambiguous and could cover broad range of persons, including musicians, ushers, and various attendants to person presiding at religious service, and circumstances of visit suggested that lay minister came to confinement facility as concerned friend, not as clergyman. Military Rules of Evid., Rule 503.

See publication Words and Phrases for other judicial constructions and definitions.

16. Military Justice ⚷ 1242

Counsel are presumed to be competent. U.S.C.A. Const.Amend. 6.

17. Military Justice ⚷ 1242

When claim of ineffective assistance of counsel is premised on counsel's failure to make motion to suppress evidence, appellant must show that there is reasonable probability that such motion would have been meritorious. U.S.C.A. Const.Amend. 6.

18. Military Justice ⚷ 1126.1

Accused failed to show that her statements to lay minister were "formal act of religion," or were made "as a matter of conscience," and thus, clergy privilege did not protect such statements; circumstances of lay minister's visit suggested that accused was seeking emotional support and

consolation, not guidance and forgiveness. Military Rules of Evid., Rule 503.

See publication Words and Phrases for other judicial constructions and definitions.

For Appellant: *Major Kevin P. Koehler* (argued); *Colonel Jay L. Cohen* and *Colonel David W. Madsen* (on brief); *Lieutenant Colonel Kim L. Sheffield.*

For Appellee: *Major LeEllen Coacher* (argued); *Colonel Theodore J. Fink* and *Lieutenant Colonel Michael J. Breslin* (on brief); *Major Jane M.E. Peterson.*

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer and enlisted members sitting at Vandenberg Air Force Base, California, convicted appellant, contrary to her pleas, of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 USC § 918. The adjudged and approved sentence provides for a dishonorable discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 44 MJ 537 (1996)

We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS APPELLANT'S ORAL AND WRITTEN STATEMENTS MADE TO OSI SPECIAL AGENT KELLY.

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE CHALLENGE FOR CAUSE OF COLONEL PETERSON.

III

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, SINCE COUNSEL SHOULD HAVE TRIED TO SUPPRESS THE PART OF TSGT WALTERS' TESTIMONY THAT PERTAINED TO A PRIVILEGED COMMUNICATION.

We hold that Issue I is moot because the statements in question were not offered as evidence. We resolve Issues II and III against appellant.

Issue I: Motion to Suppress Statements

The victim, Renee Harris, was stabbed to death in the parking lot of the Vandenberg Air Force Base Noncommissioned Officers' Club on the morning of July 31, 1993. Several hours after the stabbing, appellant was questioned by Special Agent (SA) Kelly, a member of the Air Force Office of Special Investigations (OSI). The court below found that SA Kelly "told the appellant only that she was suspected of 'stabbing' the victim, deliberately avoiding use of any word that would disclose the victim's death, although he knew the victim had died." The court below further found that "appellant did not know the victim had died, and Kelly did not want her to know." 44 MJ at 540.

[1] At trial the military judge denied appellant's motion to suppress her statements to SA Kelly. For reasons not apparent from the record, the prosecution did not introduce these statements into evidence. That being the case, the court below held that the issue was moot. Appellant argues the issue is not moot, however, "since the military judge's pretrial ruling definitely affected trial defense counsel's tactical and strategic decisions throughout the trial." The court below rejected this argument, as do we.

[2, 3] The question whether an issue is moot is a question of law that we review *de novo. See United States v. Shover,* 45 MJ 119, 122 (1996). An issue is moot if resolving it "would not result in 'a material alteration of the situation for the accused or for the Government.'" *United States v. Clay,* 10 MJ 269 (CMA 1981).

Although appellant asserts that the military judge's ruling affected "tactical and strategic decisions throughout the trial," she has not identified what decisions were affected or what she would have done differently. Accordingly, like the court below, "we are in no position to speculate about other paths the defense might have taken with a different ruling." 44 MJ at 540. We therefore hold that the issue is moot. *See United States v. Sullivan,* 42 MJ 360, 364 (1995) (expectation of privacy in wireless telephone call moot); *United States v. Loving,* 41 MJ 213, 258 (1994) (alleged misconduct of judge moot), *aff'd on other grounds,* — U.S. —, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996).

Issue II: Challenge for Cause

During general *voir dire,* the senior member of the panel, Colonel (Col) Peterson, disclosed that he knew OSI Special Agent Stewart, a prosecution witness. In response to questioning by the military judge, Col Peterson said that he considered SA Stewart "very credible because of the job he has." He responded in the affirmative when asked if he would "be able to consider his testimony in accordance with the . . . [military judge's] instructions . . . regarding the credibility of the witnesses who may testify." Col Peterson answered in the negative when asked if he would "automatically" believe SA Stewart when weighing Stewart's testimony against other witnesses.

During individual *voir dire,* Col Peterson responded to defense counsel's questions by saying that he did not socialize

with SA Stewart but knew him professionally. Col Peterson said that through his working with SA Stewart, he "found him to be an individual that if I were a commander, I would want in my organization." Col Peterson said that "there would be no question" that he would be able to weigh any contradictions in SA Stewart's testimony.

Col Peterson also disclosed that he had heard about the case. He explained:

> We were in [a] staff meeting and got a briefing as to some degree that there was a problem at the club and there was an individual that was killed and—or that died. I'm not—I can't even remember how it was presented. And then there were some articles in the paper early on. And that's about all I recall of the case.

In response to defense counsel's questions, Col Peterson described what he learned in the newspaper as follows:

> What I can remember was that there was an altercation at the NCO Club. An individual was stabbed. It was a female that had worked at the commissary and it occurred at the parking lot. The—what was it—there was a lot of blood in the parking lot. It was a stabbing. And that's about it. It ended up in the hospital Emergency Room.

Finally, the military judge asked Col Peterson what he would rely on if he heard "evidence in the court which does not jive with" the newspaper accounts. Col Peterson responded, "The court." The military judge then asked, "Would you have any difficulty doing that?" Col Peterson responded, "No. None."

The defense challenged Col Peterson for cause, arguing that Col Peterson was "too familiar with this case to sit impartially," and that he considered SA Stewart "very

credible." The military judge denied the challenge. Defense counsel then exercised a peremptory challenge against Col Peterson and preserved the issue for appellate review by announcing that he would have exercised his peremptory challenge against another member if the challenge for cause had been granted. *See* RCM 912(f)(4), Manual for Courts-Martial, United States (1995 ed.).

SA Stewart testified before the members on the merits. He described his search of appellant's home, conducted with her consent. During that search a set of knives in a knife block was seized because one of the knives was missing from the set and the knife found at the crime scene appeared to be part of the set. His credibility was not attacked during either cross-examination or argument.

Appellant argues that Col Peterson should have been removed for cause for both actual bias as well as implied bias. Final Brief at 11–12. Appellate government counsel argue that Col Peterson's official contacts with SA Stewart and his limited prior knowledge of the facts of the case were insufficient to constitute actual bias. Answer to Final Brief at 12–14. The Government does not address appellant's argument that Col Peterson should have been removed for implied bias.

[4] RCM 912(f)(1)(N) provides that a court member "shall be excused" when that member "[s]hould not sit . . . in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule includes both actual bias and implied bias. *United States v. Minyard,* 46 MJ 229, 231 (1997), citing *United States v. Daulton,* 45 MJ 212, 217 (1996), and *United States v. Harris,* 13 MJ 288, 292 (CMA 1982). RCM 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge."

[5, 6] On issues of actual bias, prior professional relationships and "innocuous prior knowledge of the facts of a case" are not *per se* disqualifying. *See United States v. Lake,* 36 MJ 317, 324 (CMA 1993); *see also United States v. Hamilton,* 41 MJ 22, 25 (CMA 1994). The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds,* 23 MJ 292, 294 (CMA 1987).

[7–10] We review a military judge's ruling on a challenge for cause for abuse of discretion. While military judges must grant challenges for cause liberally, "we will not overturn the military judge's determination not to grant a challenge except for a clear abuse of discretion in applying the liberal-grant mandate." *United States v. White,* 36 MJ 284, 287 (CMA 1993). The question of actual bias "is essentially one of credibility and therefore largely one of demeanor." *Reynolds,* 23 MJ at 294, citing *Patton v. Yount,* 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984). The military judge enjoys "great deference because we recognize that he has observed the demeanor of the participants in the voir dire and challenge process." *White,* 36 MJ at 287; *see also Daulton,* 45 MJ at 217.

[11, 12] On the other hand, issues of implied bias are reviewed under a somewhat less deferential standard. While actual bias is reviewed through the eyes of the military judge or the court members, implied bias is reviewed under an objective standard, viewed through the eyes of the public. *Daulton, supra.* The focus "is on the perception or appearance of fairness of the military justice system." *United States v. Dale,* 42 MJ 384, 386 (1995).

[13] With respect to actual bias, we hold that the military judge did not abuse his discretion. Col Peterson's responses during *voir dire* unequivocally demonstrated his willingness to judge the case based on the evidence presented

in open court in accordance with the military judge's instructions.

[14] Although we consider the issue of implied bias a closer call, we agree with the court below that "a reasonable, disinterested layman would not see unfairness in Col Peterson's continued presence." 44 MJ at 541. Col Peterson's prior knowledge of the case was limited and general. His association with SA Stewart was not social, but purely professional. SA Stewart's credibility at trial was not contested. His testimony before the members was limited to his description of the search of the crime scene and the search, with her consent, of appellant's home. Under these circumstances, we hold that the military judge did not abuse his discretion on the question of implied bias. *See generally United States v. Allred,* 867 F.2d 856, 870 (5th Cir.1989) (no implied bias where juror had social contact with criminal investigator); *United States v. Bradshaw,* 787 F.2d 1385, 1390 (10th Cir.1986) (no implied bias where juror had business dealings with government witness).

Issue III: Privileged Communications

[15] Appellant asserts that her trial defense counsel was ineffective because he did not object to the testimony of Technical Sergeant (TSgt) Walters. Appellant argues that TSgt Walters was a "lay minister" at the base chapel, that her conversation with him was protected by the clergy privilege under Mil.R.Evid. 503, Manual, *supra,* and that TSgt Walters' testimony would have been excluded if her defense counsel had objected.

At trial TSgt Walters testified that, on August 7, 1993, he had a conversation with appellant while "visiting her as a friend." He testified that the stabbing of Renee Harris was never mentioned during the conversation but that he understood that appellant was talking about the stabbing. He

testified: "For the most part, she was letting us know that she was okay because that was my reason for being there." During the conversation, appellant told TSgt Walters that "she realized what had happened and everything that had been done"; that "she wasn't angry or enraged or anything when the incident occurred"; and that she knew what she did was wrong. Appellant argues that she was prejudiced by TSgt Walters' testimony because it was the only direct evidence of premeditation and without it, she probably would have been convicted only of unpremeditated murder or voluntary manslaughter. Final Brief at 16.

In an affidavit prepared 13 months after her trial and 18 months after the allegedly privileged conversation, appellant states that TSgt Walters was a "layminister [sic] at one of the little chapel's [sic] on Vandenberg AFB, C[A], and that he was very involved with those activities." Appellant asserts that, while she was in pretrial confinement, TSgt Walters visited her and told her that "all of a sudden he felt compelled to come and visit [her], as one of his fellow sisters in trouble and need." During this visit, she "was compelled to lay . . . [her] burdens before him." Finally, she asserts that she "felt very confident in expressing and releasing [her] innermost feelings, since . . . [she] knew that all communications with ministers and chaplains were considered privileged communication." Finally, appellant asserts that her counsel knew that TSgt Walters was a lay minister.

TSgt Walters also prepared an affidavit at about the same time as appellant's. In his affidavit he states:

> My visits [with appellant] were as an acquaintance through our common organization and as a co-member of the Hospital Top Four. I am also a lay minister at the Base Chapel (#2) and on one occasion my wife and I prayed with MSgt Napoleon between August and September 1993. My visits

> with MSgt Napoleon were to see if her children were taken care of and if she needed our help for anything. Periodically I would drop a gallon of drinking water by for her due to poor water conditions in the facility. As a servant of the Lord Jesus Christ I followed my teaching to visit those in captivity.

[16, 17] Counsel are presumed to be competent. To prevail on a claim of ineffective assistance of counsel, an appellant must rebut the presumption of competence. *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984); *United States v. Scott,* 24 MJ 186, 188 (CMA 1987). When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, and appellant must show that there is a reasonable probability that such a motion would have been meritorious. *See Loving,* 41 MJ at 244, 246; *see also Boag v. Raines,* 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance."). Thus we turn to the merits of appellant's claim that her conversation with TSgt Walters was privileged.

Mil.R.Evid. 503(a) protects as privileged "a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience." Mil.R.Evid. 503(b)(1) defines "clergyman" as "a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman." Mil.R.Evid. 503 is similar to proposed Fed.R.Evid. 506, which was not adopted. The Advisory Committee Note on the proposed federal rule indicates that "clergyman" was intended to mean a person "regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi,

or minister of an established Protestant denomination." *See* 2 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 601–02 (5th ed.1990); S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 557 (3d ed.1991).

The question whether a conversation is privileged is a mixed question of law and fact. *United States v. Coleman,* 26 MJ 407, 409 (CMA 1988). Because the issue was not raised at trial, we have no factfinding by the military judge. The court below took the affidavits of appellant and TSgt Walters at face value and found that they fell short of showing a privileged communication.

We agree with the court below that appellant has not met her burden of showing that TSgt Walters, a lay minister, was a "clergyman" or "clergyman's assistant." The term "lay" means "not of the clergy." Webster's Third New International Dictionary 1281 (1986). Consequently, the term "lay minister" is ambiguous and could cover a broad range of persons, including musicians, ushers, and various attendants to the person presiding at a religious service. On their face, then, the affidavits submitted by appellant and TSgt Walters do not establish that TSgt Walters was a "clergyman" or was acting as a "clergyman's assistant." *See United States v. Brooks,* 2 MJ 102, 105 (CMA 1977) (essential element of privileged communication is that it was made to a person subject to the privilege); *United States v. Garries,* 19 MJ 845, 859–60 (AFCMR 1985) (communication to church deacon not privileged because deacon not qualified to perform substantive pastoral duties), *aff'd on other grounds,* 22 MJ 288 (CMA 1986).

We also hold that appellant has not met her burden of showing that she "reasonably believed" TSgt Walters was a clergyman. The affidavits contain no information about TSgt Walters' religious qualifications or his duties as a "lay

minister." The circumstances of the visit suggest that TSgt Walters came to the confinement facility as a concerned friend, not as a clergyman.

[18] Finally, we hold that appellant has failed to show that her admissions to TSgt Walters were a "formal act of religion" or were made "as a matter of conscience." The Supreme Court has explained that the clergy privilege "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Trammel v. United States,* 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). A communication is not privileged, even if made to a clergyman, if it is made for emotional support and consolation rather than as a formal act of religion or as a matter of conscience. *See Coleman,* 26 MJ at 407 (disclosures to father-in-law who was a minister not privileged). The circumstances of TSgt Walters' visit, as described in the affidavits, suggest that appellant was seeking emotional support and consolation, not guidance and forgiveness.

Because appellant has not shown that a motion to suppress the testimony of TSgt Walters would have been meritorious, she has not carried her burden of rebutting the presumption that her counsel were competent.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judge EFFRON concur.

SULLIVAN, Judge (concurring in part and in the result):

The defense loss of the suppression motion obviously affected its tactics in this case and, therefore, I would not

consider it moot. I would not extend this Court's holding in *United States v. Gee,* 39 MJ 311 (CMA 1994) (failure to call character witnesses barred review of denial of defense motion to prevent Government from questioning said witnesses about accused's prior uncharged misconduct). I would hold that there was no Article 31, Uniform Code of Military Justice, 10 USC § 831, violation in this case. That article requires only that an accused or a suspect be advised of "stabbing" the victim. These warnings were adequate. See *United States v. Rice,* 11 USCMA 524, 526, 29 CMR 340, 342 (1960); *United States v. Davis,* 8 USCMA 196, 198, 24 CMR 6, 8 (1957).

CRAWFORD, Judge (concurring in part and in the result):

I would hold that the military judge did not "clear[ly] . . . abuse his discretion" in denying the challenge for cause against Colonel Peterson. *United States v. White,* 36 MJ 284, 287 (CMA 1993) (emphasis added). But implied bias should be reserved for "rare circumstances" when the potential juror has an emotional involvement which would adversely affect impartiality or was a victim of a similar crime. See *Hunley v. Godinez,* 975 F.2d 316, 320 (7th Cir.1992); *United States v. Minyard,* 46 MJ 229, 232 (1997) (Crawford, J., dissenting); see also *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

APPENDIX B

UNITED STATES

v.

Master Sergeant Doris L. NAPOLEON, FR222–36–4556,
United States Air Force

ACM 31332

U.S. Air Force Court of Criminal Appeals.

Sentence Adjudged 12 March 1994.

Decided 26 April 1996.

Accused was convicted by general court-martial convened at Vandenberg Air Force Base, California, William C. Thompson, Jr., J., of premeditated murder. The United States Air Force Court of Criminal Appeals, Starr, J., held that: (1) any error claimed by accused in military judge's failure to suppress accused's inculpatory statements to special agent made several hours after victim's stabbing was not preserved; (2) military judge did not abuse his discretion in denying defense challenge for cause of member who stated during general voir dire that he knew potential witness and considered him "very credible"; and (3) accused was not denied effective assistance of counsel because her trial defense counsel did not object to testimony that accused maintained was inadmissible under privilege of confidential communications to clergyman.

Affirmed.

1. Military Justice ⚷ 1415

Any error claimed by accused in military judge's failure to suppress accused's inculpatory statements to special agent made several hours after victim's stabbing was not preserved, where prosecution did not offer accused's pretrial statements to officer into evidence during its case, and defense rested without presenting evidence. UCMJ, Art. 31(b), 10 U.S.C.A. § 831(b).

2. Military Justice ⚷ 884.1

Military judge did not abuse his discretion in denying defense challenge for cause of member who stated during general voir dire that he knew potential witness and considered him "very credible," where member conscientiously answered questions asked of him and clearly understood his duty to sit as impartial trier of fact.

3. Military Justice ⚷ 884.1

Accused is entitled to members who will keep open mind, decide case on evidence presented, and follow judge's instructions on law.

4. Military Justice ⚷ 1420

Denial of challenge for cause will be reversed only for clear abuse of discretion.

5. Military Justice ⚷ 884.1

Member is not per se disqualified from serving because he professionally knows particular witness, possesses degree of professional respect for particular witness, or has read or heard about facts in case; instead military judge must determine whether actual or implied bias exists when member

has personal belief or attitude that will not yield to evidence and judge's instructions.

6. Military Justice ⊶ 884.1

Implied bias exists to support challenge for cause when member's continued presence would cast substantial doubt on legality, fairness, and impartiality of trial. R.C.M. 912(f)(1)(N).

7. Military Justice ⊶ 884.1

Focus of implied bias rule on challenge for cause of member is on perception or appearance of fairness of military justice system. R.C.M. 912(f)(1)(N).

8. Military Justice ⊶ 884.1

Inquiry on implied bias of member focuses on whether reasonable, disinterested layman would think proceedings would smack of unfairness with challenged member's continued presence.

9. Military Justice ⊶ 1242

Accused was not denied effective assistance of counsel based on her trial defense counsel's failure to object to testimony she maintains was inadmissible under privilege of confidential communications to clergyman; defense objection to lay minister's testimony would probably not have been sustained, since she was not confiding in him as formal act of religion or as matter of conscience, and, even if his testimony had been excluded, findings would have been same, since other evidence of accused's premeditated design to kill was compelling. U.S.C.A. Const.Amend.6.

10. Military Justice ⚷ 1242

Trial defense counsel enjoys strong presumption that he or she has rendered effective assistance and made all significant decisions in exercise of reasonable professional judgment.

11. Military Justice ⚷ 1242

To prevail on claim of ineffective assistance of counsel, accused has heavy burden in overcoming presumption that trial defense counsel has rendered effective assistance of counsel; allegation must clearly explain exact manner in which trial defense counsel was deficient so that government and appellate court may sensibly evaluate it.

12. Military Justice ⚷ 1242

To establish claim of ineffective assistance of counsel, accused must show that trial defense counsel was deficient by showing that he or she made errors so serious that counsel was not providing assistance guaranteed by Sixth Amendment. U.S.C.A. Const.Amend. 6.

13. Military Justice ⚷ 1242

To establish ineffective assistance of counsel, accused must show that counsel's deficient performance prejudiced defense, which requires showing that trial defense counsel's errors were so serious they deprived accused of "fair trial," that is, trial whose result is reliable. U.S.C.A. Const. Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

14. Military Justice ⚷ 1242

Test of counsel's performance on ineffective assistance

of counsel claim is not that he or she lost or that some options were not pursued or could have been pursued differently, without regard to degree of utility or potential hazard of each. U.S.C.A. Const.Amend. 6.

15. Military Justice ⚷ 1242

Benchmark for judging any claim of ineffectiveness is whether counsel's performance so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result. U.S.C.A. Const. Amend. 6.

16. Military Justice ⚷ 1418

If strong presumption of trial defense counsel's effectiveness has not been overcome by accused's submissions and record, issue may be disposed of without further intruding into attorney-client relationship by requiring response from trial defense counsel. U.S.C.A. Const.Amend. 6.

17. Military Justice ⚷ 1126.1

Privilege regarding communications with clergyman recognizes human need to disclose to spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.

18. Military Justice ⚷ 1126.1

Privilege regarding communications with clergyman reflects accommodation between public's right to evidence and individual's need to confide in spiritual counselor.

19. Military Justice ⚷ 1126.1

For "privilege of confidential communications to

clergyman" to apply, communication must be made either as formal act of religion or as matter of conscience, it must be made to clergyman in his capacity as spiritual advisor, and communication must be intended to be confidential.

See publication Words and Phrases for other judicial constructions and definitions.

Sentence adjudged 12 March 1994 by GCM convened at Vandenberg Air Force Base, California. Military Judge: William C. Thompson, Jr.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Captain Eric N. Eklund, and Captain J. Knight Champion, III.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Major Jane M.E. Peterson.

Before DIXON, SCHREIER, and STARR, Appellate Military Judges.

OPINION OF THE COURT

STARR, Judge:

Arlyta Renee Harris was stabbed to death with a kitchen knife in the parking lot of the Vandenberg Air Force Base Noncommissioned Officers' (NCO) Club during the very early morning hours of 31 July 1993. There were no eyewitnesses, but suspicion centered almost immediately upon the appellant, and she was ultimately convicted of premeditated murder. The convening authority approved the adjudged sentence of dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to E–1. The appellant presents three issues for our consideration: that the military judge erred by failing to suppress her statements to an Air Force Office of Special Investigations (AFOSI) agent; that the military judge erred by failing to

grant a defense challenge for cause; and that her two trial defense counsel were ineffective by failing to object to testimony that revealed privileged communications between the appellant and a "lay minister." We reject these contentions, and we affirm the findings and sentence.

[1] The appellant first claims the military judge erred by failing to suppress her inculpatory statements, made several hours after the stabbing, to Special Agent Kelly of the AFOSI. At the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the appellant moved to suppress the statements, because when advising her of her rights under Article 31(b), UCMJ, Kelly told the appellant only that she was suspected of "stabbing" the victim, deliberately avoiding use of any word that would disclose the victim's death, although he knew the victim had died. At the time of the interview, the appellant did not know the victim had died, and Kelly did not want her to know.

The military judge ruled against the appellant, concluding the information Kelly provided the appellant "was sufficient to orient her as to the nature, transaction, or incident of which she was suspected." Notwithstanding the military judge's ruling, the prosecution did not offer the appellant's pretrial statements to Kelly into evidence during its case. After the conclusion of the prosecution's case, the defense rested without presenting evidence. According to the appellant, however, the issue is not moot, "since the military judge's pretrial ruling definitely affected trial defense counsel's tactical and strategic decisions throughout the trial."

This claim of error warrants only brief comment. First, the appellant does not tell us what trial decisions were affected by the ruling, and we are in no position to speculate about other paths the defense might have taken with a different ruling. We observe, however, that had the judge ruled the statements inadmissible on the theory advanced by

the defense, and had the appellant taken the witness stand and testified any differently than her pretrial statements, the prosecution could still have used them for impeachment purposes. Mil.R.Evid. 304(b)(1). Second, the appellant offers no authority for the proposition that error may be preserved when an objected-to inculpatory statement by an accused is not presented to the factfinder, and we have found no such authority. There is, however, authority to the contrary in analogous situations. *See United States v. Gee,* 39 M.J. 311 (C.M.A.1994) (*in limine* ruling signaling probable admission of prosecution evidence, never admitted, held insufficient to preserve issue); *United States v. Saul,* 26 M.J. 568, 572–73 (A.F.C.M.R.1988), *pet. denied,* 27 M.J. 434 (C.M.A.1988) (judge's refusal to preliminarily rule on evidence of uncharged misconducted, never admitted, held insufficient to preserve issue); *United States v. Rusinskas,* 35 M.J. 808, 809 (N.M.C.M.R.1992) (*in limine* denial of defense motion to suppress prior conviction as impeachment, never admitted, held insufficient to preserve issue). We therefore reject the appellant's first claim of error.

[2] The appellant next claims the military judge erred by denying the defense challenge for cause of Colonel (Col) Peterson. During the general *voir dire,* the military judge named the potential witnesses, one of whom was the local AFOSI detachment commander. Col Peterson said he knew the witness, and in response to the military judge's questions, he said the witness was "very credible because of the job he has." Col Peterson then said he would follow the judge's instructions on witness credibility and would not automatically believe the witness' testimony without weighing it against other evidence. During individual *voir dire,* in response to questions by the defense counsel, Col Peterson said he knew the witness because of some cases he had worked through the AFOSI office. He also explained his

earlier comment. Of the witness he said: I've worked with him and found him to be an individual that if I were a commander, I would want him in my organization." He then reiterated that if there were contradictions between the witness' testimony and other evidence, he would weigh the evidence before making a credibility determination.

The defense counsel then asked Col Peterson what he had heard about the case. Col Peterson answered that soon after the incident, he had been in a staff meeting where it was announced there had been a problem at the club and someone had been killed. He added that he could not remember how the information was presented. He also said that some articles had appeared in the paper soon after the incident. When asked what he remembered from the articles, he said:

> What I can remember was that there was an altercation at the NCO club. An individual was stabbed. It was a female that had worked at the commissary and it occurred at the parking lot. The — what was it — there was a lot of blood in the parking lot. It was a stabbing. And that's about it. It ended up in the hospital emergency room.

Col Peterson added he had not drawn any conclusions based on the articles, and he would rely on evidence he saw and heard in court, rather than what he had read, in deciding the case.

The defense counsel challenged Col Peterson for cause, which the military judge denied, although he granted three other defense causal challenges based upon personal knowledge of the facts of the case. The defense then removed Col Peterson with its peremptory challenge, but preserved the issue for review. R.C.M. 912(f)(4); *United States v. Jobson,* 31 M.J. 117, 120 (C.M.A.1990).

[3, 4] An accused is entitled to members who will keep an open mind, decide the case on the evidence presented, and

follow the judge's instructions on the law. While the side that asserts a challenge for cause has the burden of proving the grounds for it, the military judge should view challenges for cause with a liberal eye. However, we will reverse the denial of a challenge for cause only for a clear abuse of discretion. *United States v. Barrow,* 42 M.J. 655, 660 (A.F.Ct. Crim.App. 1995), *pet. granted,* 43 M.J. 418 (1995).

[5–7] A member is not *per se* disqualified from serving because he professionally knows a particular witness, possesses a degree of professional respect for a particular witness, or has read or heard about facts in the case. *United States v. Lake,* 36 M.J. 317, 324 (C.M.A.1993); *United States v. Arvie,* 7 M.J. 768, 771–72 (A.C.M.R.1979). Instead, the military judge must determine whether an actual or implied bias exists which disqualifies the member. An actual bias exists when the member has a personal belief or attitude that will not yield to the evidence and the judge's instructions. An implied bias exists when the member's continued presence would cast substantial doubt on the legality, fairness, and impartiality of the trial. R.C.M. 912(f)(1)(N); *Barrow,* 42 M.J. at 660. The focus of the implied bias rule is on the perception or appearance of fairness of the military justice system. *United States v. Dale,* 42 M.J. 384, 386 (1995).

[8] Based on the member's unchallenged and unequivocal statements that he could impartially decide the case, we analyze this issue as one of implied, rather than actual, bias. *See United States v. Moyar,* 24 M.J. 635, 638 (A.C.M.R.1987). Therefore, the inquiry focuses on whether a reasonable, disinterested layman would think the proceedings would smack of unfairness with the challenged member's continued presence. *Barrow,* 42 M.J. at 661. Although another military judge faced with the same facts might have granted the challenge for cause, we believe that a reasonable, disinterested layman would not see unfairness in Col

Peterson's continued presence. Instead, we believe a layman would see a member who conscientiously answered the questions asked of him and who clearly understood his duty to sit as an impartial trier of fact. We therefore conclude the military judge did not abuse his discretion in denying the challenge.

[9] Finally, the appellant claims she was denied the effective assistance of counsel because her trial defense counsel did not object to testimony she maintains was inadmissible under the privilege of confidential communications to a clergyman. In an affidavit prepared 13 months after her trial and approximately a year and a half after the events she recounts, the appellant describes a conversation she had with TSgt Walters, who visited her several times during her pretrial confinement. She states:

> TSgt Walters and I belonged to a lot of the same committee's [sic] and were members of the Hospital Top Four group. I also knew he was a lay minister at one of the little chapel's [sic] on Vandenberg AFB, CA, and that he was very involved with those activities. During his first visit with me, he informed me that while he was out mowing his lawn that day, when all of a sudden he felt compelled to come and visit me, as one of his fellow sisters in trouble and need. It was during this visit with TSgt Walters that I was compelled to lay my burden before him. I told him that I could not understand why the seemly [sic] normal acts of that night (30 July 93), could go from a calm, no anger atmosphere to a confrontation that led to a person's death. On another occasion [sic] when TSgt Walters paid me a visit, he was accompanied by his wife, at the completion of that visit, TSgt Walters conducted a prayer session for me. Because TSgt Walters was a

> lay minister, I flet very confident in expressing and releasing my innermost feelings, since I knew that all communications with ministers and chaplains were considered privileged communications. Both [trial defense counsel] knew that TSgt Walters was a lay minister.

TSgt Walters also submitted an affidavit, likewise executed 13 months after trial and approximately a year and a half after the conversations he remembers, in which he states:

> I visited MSgt Doris Napoleon during her stay at the detention facility at Vandenberg AFB, CA in the summer and fall of 1993. My visits were through our common organization and as a co-member of the Hospital Top Four. I am also a lay minister at the Base Chapel (#2) and on one occasion [sic] my wife and I prayed with MSgt Napoleon between August and September 1993. My visits with MSgt Napoleon were to see if her children were taken care of and if she needed our help for anything. Periodically I would drop a gallon of drinking water by for her due to poor water conditions in the facility. As a servant of the Lord Jesus Christ I followed my teaching to visit those in captivity. At my first visit she informed me she was visited by a Chaplain, Col Chan (Hospital Commander), and her Supervisor (Col Barnicott) among others. The First Sergeant told me she could have visitors on weekends. She seemed very encouraged by their support and pleased to see me too.

The two trial defense counsel have not submitted affidavits in response to that of the appellant. *See United States v. Boone,* 42 M.J. 308, 313 (1995) (trial defense counsel may choose to respond to an allegation of ineffectiveness, but cannot be compelled to unless a court of competent jurisdiction finds

that the allegation and record contain evidence which, if unrebutted, would overcome the presumption of competence).

Walters did not provide evidence at the Article 32, UCMJ, investigation, but at trial he was called as a witness by the prosecution. The trial counsel directed Walters' attention to 7 August 1993 (about a week after the murder and the appellant's placement in pretrial confinement) and asked if Walters remembered a conversation with the appellant that day. Walters said yes, that on that day he was "visiting her as a friend." When asked what the appellant had said to him, Walters answered:

> Basically when I approached Sergeant Napoleon that day, I came to see her at about one o'clock or so and we, basically, met each other and we sat down and we talked. And the first thing that we got into, she said that she was fine and, you know, she was awake and out of shock. For the most part, she was letting us know that she was okay because that was my main reason for being there. At that point, you know, we said you know, she realized what had happened and everything that had been done. And she definitely told me at that time that she wasn't angry or enraged or anything when the incident occurred. It just kind of went on from there.

Walters' direct examination ended with his testimony that the appellant said she knew what she did was wrong. During cross-examination, the trial defense counsel focused on the appellant appearing to be "coming out of shock" during the conversation. Counsel got Walters to concede the appellant did not look like her "normal self" and appeared distraught during the conversation. Cross-examination concluded with Walters' testimony that he believed the appellant's realization of wrongdoing was her conclusion at the time of their conversation, rather than her feeling at the time of the

incident. During redirect, Walters again stated that during their conversation the appellant seemed to be in a state of shock. Trial counsel, apparently sensing the point of diminishing returns, ended the examination; and the defense counsel had no recross-examination.

According to the appellant, the performance of her trial defense counsel in not asserting the Mil.R.Evid. 503 privilege against Walters' testimony fails the test of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The appellant maintains that prejudice is obvious because Walter's testimony was the only "direct evidence of premeditation," without which "there probably would have been a finding of unpremeditated murder or voluntary manslaughter."

[10–13] A trial defense counsel enjoys a strong presumption that he or she has rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *United States v. Kibler,* 43 M.J. 725, 730 (Army Ct.Crim.App. 1995). To prevail on a claim of ineffective assistance of counsel, an appellant has a heavy burden in overcoming that presumption. An allegation of ineffectiveness must clearly explain the exact manner in which the trial defense counsel was deficient so that the government and the appellate court may sensibly evaluate it. *United States v. Walters,* 42 M.J. 760, 762 (Army Ct.Crim.App.1995). Then the appellant must present enough credible evidence, which, when considered together with the evidence contained in the entire appellate record, establishes two elements. First, the appellant must show the trial defense counsel was deficient. This requires showing that the trial defense counsel made errors so serious that counsel was not providing the assistance guaranteed by the Sixth Amendment. Second, the appellant must show that the deficient performance prejudiced the defense. This requires showing

that the trial defense counsel's errors were so serious they deprived the appellant of a fair trial, a trial whose result is reliable. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

[14–16] The test of counsel's performance is not that he or she lost; and it is not that some options were not pursued or could have been pursued differently, without regard to the degree of utility or the potential hazard of each. *United States v. Ingham* 42 M.J. 218 (1995). The benchmark for judging any claim of ineffectiveness is whether counsel's performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Kibler,* 43 M.J. at 731. Finally, if we conclude the strong presumption of the trial defense counsel's effectiveness has not been overcome by the appellant's submissions and the record before us, we may dispose of the issue without further intruding into the attorney-client relationship by requiring a response from the trial defense counsel. *United States v. Lewis,* 42 M.J. 1, 6 (1995).

We have no difficulty resolving this issue against the appellant without requiring any response from the trial defense counsel. First, the appellant has not carried her burden of showing her counsel were deficient. Based on the affidavits and on Walters' testimony, we are unpersuaded that a defense objection to his testimony would have been sustained. Second, there was no prejudice to the appellant. Even if Walters' testimony had been excluded, we are convinced the findings would have been the same.

[17–19] The privilege regarding communications with a clergyman "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Trammel v. United States,* 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). It reflects an accommodation between the public's

right to evidence and the individual's need to confide in a spiritual counselor. Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor; and (3) the communication must be intended to be confidential. *United States v. Moreno,* 20 M.J. 623, 626 (A.C.M.R.1985). In the second element, "clergyman" is defined as a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman. Mil.R.Evid. 503(b)(1).

It is clear from both affidavits the 7 August 1993 conversation and the prayer session were different encounters. We are not dealing with the prayer session, which came later and which, according to the appellant, was also attended by Walters' wife. In resolving the issue, we analyze the actual statements that Walters attributed to the appellant in his testimony, not what the appellant recalls in her affidavit as her statement to him. While the appellant's affidavit is useful in determining the circumstances surrounding the 7 August 1993 conversation, it is the precise statements by the appellant that Walters related in his testimony that count. These are: "And she definitely told me at that time she wasn't angry or enraged or anything when the incident occurred," and "I know what I did was wrong." Based on the affidavits and on Walters' testimony, we are not persuaded the appellant has shown either the first or second elements required to invoke the privilege.

The appellant fails to show that during the 7 August 1993 conversion she was confiding in Walters as a formal act of religion or as a matter of conscience. According to Walters' trial testimony, "she was letting us know she was okay because that was my reason for being there." Nothing in his testimony or in his affidavit gives the slightest indication that

Walters perceived the appellant's purpose as seeking spiritual counseling from him. It is clear to us that she was not confiding in Walters as a formal act of religion or as a matter of conscience. While she may have been seeking emotional comfort and perhaps sympathy in speaking with Walters about her feelings of not being angry or enraged, this does not amount to confiding in him as an act of formal religion or as a matter of conscience. Her purpose in making the comments was thus outside the privilege. *United States v. Coleman,* 26 M.J. 407 (C.M.A.1988) (accused's admissions to father-in-law minister that he molested daughter not made as formal act of religion or as matter of conscience, but instead for emotional support).

The appellant has also failed to establish the second element. We are not persuaded the appellant made the comments to Walters in his capacity as a spiritual advisor. Whatever Walters' credentials and responsibilities as a "lay minister" entailed, it is clear he was not operating in a spiritual advisor capacity during the 7 August 1993 conversation. Both his affidavit and his testimony demonstrate he was vising the appellant as a friend and as a fellow member of the Hospital Top Four group. During his testimony, Walters said nothing about his affiliation with Chapel #2 or anything relating to his lay ministry. Surely, if he was authorized by his church to administer spiritual counseling, and if he thought he had engaged in spiritual counseling with the appellant, it would have occurred to him that a privilege might exist affecting his ability to testify as a prosecution witness. We see absolutely nothing in his testimony to even hint of such a concern. Further, all we are told in the affidavits is that Walters was a lay minister. We are told nothing about what that meant to him in the context of spiritual counseling, and we decline to speculate about how he saw his role. *See United States v. Garries,* 19 M.J. 845,

859–60 (A.F.C.M.R.1985), *aff'd,* 22 M.J. 288 (C.M.A.1986) (church deacon, not qualified to perform substantive pastoral duties, considered conversation with accused nonprivileged).

The appellant has a heavy burden here, but she provides very little in the way of substantive evidence to support her position. *See United States v. McCastle,* 43 M.J. 438, 440 (1996) (insufficient factual basis to support claim). It is tempting to agree with appellate government counsel that the theory advanced by the appellant is merely an afterthought. In any event, we are convinced that had the appellant offered the trial court the same foundation she now advances regarding her conversation with Walters, any defense objection under Mil.R.Evid. 503 would have suffered rejection, and correctly so. Therefore, the appellant has not sustained her burden of showing her trial defense counsel were deficient. *See United States v. Loving,* 41 M.J. 213, 245–46 (1994) (no deficiency in defense counsel performance for not objecting to uncharged misconduct where appellate court reviews testimony and determines that an objection would not have been meritorious).

Even if we are in error concerning the availability of a defense objection to Walters' testimony, the appellant's claim also fails under the second prong of the *Strickland* test, further amplified in *United States v. Tharpe,* 38 M.J. 8, 10–11 (C.M.A.1993). If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the error, the fact finder would have had a reasonable doubt respecting guilt? In other words, had the trial defense counsel prevented Walters' testimony under Mil.R.Evid. 503, is there a reasonable probability the appellant would have been acquitted or convicted of a lesser offense? The unequivocal answer is no. There is ample evidence, much of it far more compelling than Walters' brief testimony, that the appellant possessed a premeditated design to kill the victim.

The appellant and the victim were not friends. They had become competitors for the same man, TSgt Crawford, the NCO Club night manager; and the appellant was losing. The appellant and Crawford had been romantically involved for over a year, when about a month before the murder, Crawford had broken it off and and had begun a similar relationship with the victim. The evidence showed the appellant devoted a great deal of time that month to attempting to change Crawford's mind, without success.

On the night of the murder, the appellant went to the NCO Club, where she located Crawford and the victim. The appellant stayed until closing; and then followed the victim to Crawford's dormitory room, knowing Crawford was still occupied with his duties at the club. The appellant then managed to get the victim into the appellant's car and drove the victim back to a remote part of the club parking lot. There the appellant stabbed the victim in the chest with such force that she produced a wound six inches deep with a knife whose blade was less than five inches long. With just the first blow (of a total of four or five), the knife penetrated the victim's heart, diaphragm, and liver.

Although the appellant did not habitually carry a knife, she had two knives with her that night. One was found in her purse when she was searched. The knife the appellant used to kill the victim, found nearby with the appellant's fingerprint on it, matched a set of knives from a butcher block in the appellant's home, one of which was missing when authorities searched her home the next day.

Additional evidence of a premeditated design to kill the victim is found in the appellant's preparation of a story to account for her presence with the victim. A security policeman who arrived on the scene almost immediately after the stabbing, even before the arrival of medical emergency personnel, described the appellant as being "very calm, very

cool, didn't seem to be upset" as she told him she had been driving near the shoppette when she saw the victim, who asked for a ride back to the club. According to the appellant, when they arrived at the club, she opened the door, the dome light came on, and she noticed for the first time the victim was bleeding. She helped the victim to the door of the club, which explained the large quantity of blood on her skirt and legs. Clearly, these fabricated statements just after she stabbed the victim were far more damning to the appellant's case on the issue of premeditation than the statements Walters attributed to her a week later.

The evidence of the appellant's premeditated design to kill was compelling. We have no doubt that absent Walters' testimony, the court's finding would be exactly what it was—guilty of premeditated murder. There is simply no reasonable possibility the appellant would have been acquitted or convicted of a lesser offense without Walters' testimony. We therefore also reject the appellant's third assignment of error.

The findings and the sentence are correct in law and fact and are

AFFIRMED.

Chief Judge DIXON and Senior Judge SCHREIER concur.